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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1679

WASTE MANAGEMENT
OF WISCONSIN, INC.,
Petitioner,

v.

CYNTHIA FOKAKIS,
Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The respondent, Cynthia Fokakis, by her attorneys, Bronson C. La Follette, Attorney General, and F. Thomas Creeron III, Assistant Attorney General, requests that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 1, 1980. Alternatively, respondent requests that certiorari be granted with respect to the two major questions presented below, and that the decision of the court of appeals be summarily affirmed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 614 F.2d 138 (7th Cir. 1980). The opinion of the district court appears in the appellant's appendix at page eight.

JURISDICTION

The jurisdictional requisites are set forth in the petitioner's jurisdictional statement.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (a), "State Custody; remedies in Federal courts,"

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 1343 and 42 U.S.C. § 1983 are set forth in full in the petitioner's brief at page three.

QUESTIONS PRESENTED

1. Whether jurisdiction exists over the subject matter of an action brought to challenge the terms and conditions of a criminal conviction by a corporate plaintiff.

2. Whether this action is barred by *res judicata* or collateral estoppel, even if subject matter jurisdiction is found to exist.

STATEMENT OF THE CASE

On July 31, 1975, a jury convicted Waste Management, Inc., petitioner herein, of the crime of conspiracy to restrain trade in violation of Wis. Stats. § 133.01. A $4,000.00 fine was imposed. Appeal was taken to the Wisconsin Supreme Court where no less than twenty-nine separate issues were raised. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W. 2d 147 (1978). Certiorari was subsequently denied by this Court. *Waste Management of Wisconsin, Inc. v. Wisconsin*, 439 U.S. 865 (1978).

In its complaint in the federal district court, Waste Management, Inc., set forth eight claims for relief. Each claim described a separate course of conduct allegedly engaged in by the trial judge or the prosecutor, although neither of them were named as defendants. Each of these courses of conduct, in turn, were claimed to have resulted in a violation of the federal constitutional rights of Waste Management, Inc., at the trial level of the state criminal proceedings.

Waste Management, Inc., styled its action as one for declaratory and injunctive relief, seeking a return of the $4,000.00 fine and expungement of its criminal record. This relief was sought against Cynthia Fokakis, the Clerk of Circuit Court for Dane County, Wisconsin, who was the sole defendant in the action below.

The respondent moved to dismiss the complaint on four grounds, two of which would be dispositive of this litigation. The first ground asserted was that a federal district court lacked subject matter jurisdiction to entertain an action brought by a corporate plaintiff to challenge the terms and conditions of a criminal conviction. A second ground asserted by respondent was that the collateral attack on the criminal conviction was barred by *res judicata* and/or collateral estoppel.

The district court dismissed the action for lack of subject matter jurisdiction, relying solely on *Hanson v. Circuit Court of First Judicial Circuit*, 591 F.2d 404 (7th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 220 (1979).

The Seventh Circuit Court of Appeals affirmed on the same ground, holding that such a challenge would destroy the "balance Congress struck between the interest of the individual in remaining free of unlawful intrusion on his physical freedom and the state courts' interest in remaining free of federal interference with their final judgments." *Waste Mgmt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138, 140-41 (7th Cir. 1980). The court of appeals also reasoned that, by virtue of its affirmative election of the advantanges inhering in the corporate form, Waste Management, Inc. is compelled to accept the attendant disadvantage that a corporate plaintiff may not collaterally attack the terms and conditions of a state criminal conviction. 614 F.2d at 141-42.

Petitioner has requested that a writ of certiorari be issued to review the decision of the Seventh Circuit Court of Appeals. Respondent requests that certiorari be denied, or alternatively, that the decision granting respondent's motion to dismiss be summarily affirmed on both major grounds raised by the respondent below.

ARGUMENT

I. The Decision Of The Court Of Appeals Is Not In Conflict With The Decisions Of This Court.

With reference to the initial question of subject matter jurisdiction, this Court has held that a prisoner challenging the terms and conditions of a state criminal conviction may not utilize 42 U.S.C. § 1983,

but must resort to habeas corpus under 28 U.S.C. § 2254. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). 28 U.S.C. § 2254 contains a custody requirement. Since a corporation can never be incarcerated, it can never satisfy that requirement. Although the definition of custody has become extremely broad, this Court has never permitted an attack on the terms and conditions of a criminal conviction unless the custody requirement was satisfied. *See Preiser v. Rodriquez*, 411 U.S. 475, 486, n. 7 (1973).

Petitioner argues that the reasoning contained in *Preiser v. Rodriguez* does not apply to this case because the corporation has never been in custody. Petitioner also argues, in effect, that a federal forum must be available to vindicate federal constitutional claims, and that 42 U.S.C. § 1983 must be construed accordingly.

The latter argument is untenable. The decisions of this Court indicate that there is no absolute guarantee that a federal forum will be available for the vindication of every single federal constitutional right. Under certain circumstances, fourth amendment claims will not be entertained in the federal courts. *Stone v. Powell*, 428 U.S. 465 (1976). Similarly, there is no assurance that federal constitutional claims which have been litigated in the state courts will be reexamined. *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964). Most recently, in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905 (1979), it was held that civil rights claims bottomed solely on the Supremacy Clause are not cognizable in the federal courts under 42 U.S.C. § 1983. The decision below expressly recognized this proposition: "As we said in *Hanson*, '[d]irect review by the United States Supreme Court is sufficient to preserve the role of the federal courts as the ultimate guardians of federally guaranteed rights.' 591 F.2d at 411." *Waste*

Mgmt. of Wisconsin, Inc. v. Fokakis, 614 F.2d at 141. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606, n. 18 (1975). Thus, the mere fact that there is no federal forum for petitioner's federal constitutional claims is not inconsistent with the decisions of this Court.

The former argument ignores the intent of Congress in enacting and repeatedly amending the federal habeas corpus statute, 28 U.S.C. § 2254. The purpose of this statute is to foster the principle of federalism by maintaining the integrity of the states' judicial systems. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 490-91 (1973). *See also Stone v. Powell*, 428 U.S. 465, 491, n. 31 (1976). 28 U.S.C. § 2254 must be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905, 1911 (1979). In applying the principle of federalism, special deference must be paid to a state concerning the operation of its criminal court system. *Cf. Younger v. Harris*, 401 U.S. 37 (1971). The sanctioning of this and similar legal actions by corporate and individual plaintiffs would entirely ignore "the necessity of finality in criminal trials." *Stone v. Powell*, 428 U.S. at 491. Federal courts would be required to "sit in perpetual review of all criminal decisions." *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978). In holding that an action challenging the terms and conditions of a state criminal conviction is, in reality, a federal habeas corpus action, the fifth and seventh circuits used language almost identical to that used by the Court in deciding a similar issue:

> In amending the habeas corpus law in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. *It would wholly frustrate explicit congressional intent to hold that the*

> *respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of* § 1983.

Preiser v. Rodriguez, 411 U.S. 475 at 489-90 (emphasis supplied). *See Hanson v. Circuit Court of First Judicial Circuit*, 591 F.2d 404, 411 (7th Cir. 1979) and *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978).

Because the decision in this case does not conflict with decisions of this Court, a writ of certiorari should not issue to review the decision of the Seventh Circuit Court of Appeals.

II. If This Court Deems The Conflicts Among The Circuit Courts Of Appeal To Be Significant, It Should Resolve Those Conflicts By Summary Affirmance Of The Decision Below.

It must be conceded that there is a conflict among the circuits with regard to both major questions presented below./[1]

/[1]There is also an apparent conflict among the circuits concerning a third claim made by respondents below. Respondent also asserted that an action of this nature cannot be maintained against a county clerk of a circuit court, because the county official has no interest in the outcome of the proceedings. *Compare, Cavett v. Ellis*, 578 F.2d 567, 570, n. 6 (5th Cir. 1978) *with Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978).

One of the underpinnings of the decision made by the seventh circuit below is that habeas corpus provides the sole federal remedy for collateral attack on a state judgment of conviction. 614 F.2d at 140. This position is not adhered to by all circuit courts of appeal. *Compare Hanson v. Circuit Court of First Judicial Circuit,* 591 F.2d 404 (7th Cir. 1979) and *Cavett v. Ellis,* 578 F.2d 567 (5th Cir. 1978) *with Strader v. Troy,* 571 F.2d 1263 (4th Cir. 1978) and *Shipp v. Todd,* 568 F.2d 133 (9th Cir. 1978). *See Hanson v. Circuit Court of First Judicial Circuit,* ___ U.S. ___, 100 S.Ct. 220 (1979) (denying certiorari) (White, J., dissenting). However, no court of appeals has ever held that a corporation may challenge the terms and conditions of a state criminal conviction.

The conflict among the circuits as to the applicability of the doctrines of *res judicata* and/or collateral estoppel in actions under 42 U.S.C. § 1983 is amply documented in *McCurry v. Allen,* 606 F.2d 795, 797-99 (8th Cir. 1979). The Court now has an opportunity to resolve this question since certiorari has been granted. *Allen v. McCurry,* ___ U.S. ___, 100 S.Ct. 1012 (1980).

Without exception, the decisions of those circuit courts of appeal which support the respondent's position are better reasoned.

As to the issue of subject matter jurisdiction, the decisions of the fourth and ninth circuits antedate those of the fifth and seventh circuits. Neither the fourth nor the ninth circuit examined 42 U.S.C. § 1983 in conjunction with 28 U.S.C. § 2254. There is no indication that the question of subject matter jurisdiction was ever raised in the two earlier decisions. The dissenting member of the panel in the fourth circuit did not rely upon the issue of subject matter jurisdiction to support his position. The fifth circuit was the

first to critically examine the issue of subject matter jurisdiction in light of the appropriate statutes. The seventh circuit had the benefit of both lines of analysis before reaching its decision. Upon examining those analyses, the seventh circuit agreed with the fifth circuit that to allow a plaintiff who only paid a fine to challenge a state court criminal conviction would effectively emasculate the custody requirement of the federal habeas corpus statute. *Hanson v. Circuit Court of First Judicial Circuit,* 591 F.2d 404, 410 (7th Cir. 1979).

As to the second question presented, this Court has three times indicated in dictum that actions under 42 U.S.C. § 1983 are governed by normal rules of *res judicata* and/or collateral estoppel. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 606 n. 18 (1975); *Wolff v. McDonnell,* 418 U.S. 539, 554 n. 12 (1974); *Preiser v. Rodriguez,* 411 U.S. 475, 497 (1973). At least seven circuit courts of appeal have held at various times that *res judicata* and/or collateral estoppel are viable defenses in an action under 42 U.S.C. § 1983. *McCurry v. Allen,* 606 F.2d 795 at 797-98. *See also Goss v. State of Illinois,* 312 F.2d 257 (7th Cir. 1963).

Should certiorari be granted, this second question should be decided because it was properly raised below. In its complaint filed in the federal district court, petitioner affirmatively alleged that all of its federal constitutional claims were raised in the state courts. Respondent moved to dismiss not only for lack of subject matter jurisdiction but also for failure to state a claim upon which relief could be granted. It is apparent that the Wisconsin Supreme Court gave plenary consideration to petitioner's federal constitutional claims. *State v. Waste Management of Wisconsin, Inc.,* 81 Wis. 2d 555, 261 N.W.2d 147 (1978).

Since it was provided with an opportunity to fully and fairly litigate its federal constitutional claims in the state courts and it chose to do so, petitioner should now be precluded from reasserting the identical claims in a collateral federal action.

The overwhelming weight of authority supports the position of the respondent with respect to both questions presented. Under such circumstances, if a writ of certiorari should issue, summary affirmance is a proper vehicle to resolve conflicts among the circuit courts of appeal. *United States v. Lane Motor Co.*, 344 U.S. 630 (1953). *See also Brotherhood of Loc. Eng. v. B. & O. R. Co.*, 372 U.S. 284 (1963). Because the decision of the Seventh Circuit Court of Appeals is in harmony with all pertinent decisions of this Court, a writ of certiorari should not issue. If a writ does issue, the decision below should be summarily affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court not issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals. In the alternative, the decision granting respondent's motion to dismiss should be summarily affirmed on the two major grounds raised by the respondent below.

Dated at Madison, Wisconsin, this 22nd day of May, 1980.

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